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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Case No. 10-cv-04535-LHK

Plaintiff,

vs.

BARBRA ALEXANDER, BETH PIÑA, MICHAEL E.
SWANSON, AND APS FUNDING, INC.,

SECURITIES AND EXCHANGE
COMMISSION'S MOTION TO LIFT
STAY; MEMORANDUM IN
SUPPORT

Defendants.

DATE: November 6, 2014
TIME: 1:30 p.m.
JUDGE: Hon. Lucy H. Koh
LOCATION: Courtroom 8

NOTICE OF MOTION AND MOTION TO LIFT STAY

PLEASE TAKE NOTICE THAT on November 6, 2014 at 1:30 p.m., or as soon thereafter as
the matter may be heard, in the courtroom of the Honorable Lucy H. Koh, Courtroom 8, 4th Floor,
United States District Court, 280 South 1st Street, San Jose, CA 95113, Plaintiff Securities and
Exchange Commission ("Commission") will, and hereby does, move the Court to lift the stay

1 previously ordered in this case pending the resolution of the related criminal case *U.S. v. Alexander et*
 2 *al.* (CR10-00730 (LHK)).

3 This motion is supported by the simultaneously filed Memorandum, and the proposed Order.

4 **MEMORANDUM IN SUPPORT OF MOTION TO LIFT STAY**

5 This is a civil enforcement action by plaintiff Securities and Exchange Commission
 6 (“Commission”) to enjoin violations of the federal securities laws and recover money taken from
 7 defrauded investors. The Commission filed its complaint in this case on October 7, 2010 (ECF No.
 8 1). As alleged in the Commission’s complaint, defendants Barbra Alexander, Beth Piña, Michael E.
 9 Swanson and APS Funding, Inc. (together, “Defendants”) misappropriated approximately \$2.5
 10 million of the \$7 million they raised from close to 50 investors through the fraudulent sale of interests
 11 in two real estate investment funds.

12 The complaint alleges that Defendants’ scheme violated the antifraud and registration
 13 provisions of the federal securities laws. In relief, the Commission seeks a Court order that enjoins
 14 Defendants from further securities law violations, requires them to disgorge their ill-gotten gains plus
 15 prejudgment interest, and imposes civil monetary penalties. *Id.*, ¶ 5.

16 On October 6, 2010, the U.S. Attorney’s Office for the Northern District of California
 17 (“USAO”) unsealed an indictment against Swanson, Alexander and Piña concerning their fraudulent
 18 sales and other conduct relating to the two real estate investment funds. *U.S. v. Alexander, et al.*, 10-
 19 cr-730-LHK.

20 **The Court Stays the Commission’s Case.**

21 On December 22, 2010, upon the request of the defendant Michael Swanson, the Court stayed
 22 defendants’ Answers and all discovery, subject to case-by-case exceptions for discovery from third
 23 party investor witnesses where good cause was shown (ECF Nos. 25, 28). The order provided that
 24 any party could ask to have the stay lifted within fifteen days after criminal proceedings were
 25 terminated (ECF No. 25, 12: 8-10). Four months later the case was reassigned to the Honorable
 26 Edward J. Davila for all further proceedings (ECF No. 34).

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1 Judge Davila issued an order on March 26, 2014, citing the ongoing criminal proceedings and
 2 stay as bases for directing the Clerk of the Court to administratively close this case with the proviso
 3 that the parties were to inform the Court of the final resolution of the related criminal case at the trial
 4 court level and request that the case be scheduled for a Case Management Conference. (ECF No. 46)
 5 Prior to the resolution of the criminal case, this Court issued an order relating the SEC case to the
 6 criminal case. (ECF No. 48). Both cases are now once again before this Court.

7 In the stay order issued in December 2010, the Court weighed the defendants' Fifth
 8 Amendment privilege against a speedy resolution of the Commission's enforcement action and
 9 determined that the criminal proceedings should take precedence (ECF No. 25). The defendants have
 10 therefore been able to mount their defenses without any possible burden of having to defend
 11 themselves in the civil case at the same time. But now the three defendants charged in both civil and
 12 criminal cases have either pled guilty (in the case of Beth Piña) or been convicted after a jury trial (in
 13 the case of both Swanson and Alexander). (*U.S. v. Alexander et al.*, 10-cr-00730, ECF Nos. 327, 328
 14 and 359). And all three have been sentenced. Pina was sentenced to 3 years of probation; Swanson
 15 and Alexander were sentenced to prison terms of 37 and 108 months, respectively. *Id.*

16 Because the criminal case at the trial court level has been resolved, the Commission now
 17 seeks to have the stay lifted and its case returned to the active docket. In light of the convictions and
 18 plea by the defendants, the Commission does not expect to engage in extensive pre-trial litigation, but
 19 instead to try to resolve the case either through settlement or a motion based on collateral estoppel.

20 Therefore, the Commission respectfully requests that the Court lift the stay and order each of
 21 the three defendants to file an Answer to the Commission's complaint.

22 DATED: July 29, 2014

23 Respectfully Submitted,

24 /s/ Sheila E. O'Callaghan
 25 Sheila E. O'Callaghan
 26 Eric M. Brooks
 27 Attorneys for Plaintiff
 28 SECURITIES AND EXCHANGE
 COMMISSION